Nos. 98-963, 98-978

In The

Supreme Court of the United States

October Term, 1998

JEREMIAH W. NIXON, et al.,

Petitioners,

v.

SHRINK MISSOURI GOVERNMENT PAC and ZEV DAVID FREDMAN,

Respondents.

JOAN BRAY,

Petitioner,

v.

SHRINK MISSOURI GOVERNMENT PAC, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF THE SECRETARIES OF STATE OF MAINE, MONTANA, RHODE ISLAND, TENNESSEE, WEST VIRGINIA AND WISCONSIN; THE GENERAL COUNSEL FOR THE CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION; THE EXECUTIVE DIRECTOR OF THE HAWAII CAMPAIGN FINANCE SPENDING COMMISSION; AND THE DIRECTOR OF THE REGISTRY OF ELECTION FINANCE OF KENTUCKY IN SUPPORT OF PETITIONERS

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21 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI 1

STATEMENT 2

REASONS FOR GRANTING THE PETITION 4

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS WHICH RECOGNIZE THAT LARGE CAMPAIGN CONTRIBUTIONS CAUSE REAL AND IRREPARABLE HARM TO OUR POLITICAL PROCESSES 4

II. THE EIGHTH CIRCUIT'S COMPLETE LACK OF DEFERENCE TO THE MISSOURI LEGISLATURE IS INCONSISTENT WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS AND CASES INVOLVING FEDERAL CONSTITUTIONAL SUPERVISION OF STATE ELECTORAL SYSTEMS 8

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Blount v. SEC, 61 F.3d 938 (D.C. Cir. 1995) 5

Brown v. Thomson, 462 U.S. 846 (1983) 13

Buckley v. Valeo, 424 U.S. 1 (1976) ..... *passim*

Burson v. Freeman, 504 U.S. 191 (1992) 11

City of Boerne v. Flores, 512 U.S. 507 (1997) 12

Colorado Republican Federal Campaign Comm. v. FEC, 518 U.S. 604 (1996) 4, 7

CBS v. Democratic National Committee, 412 U.S. 94 (1973) 12

CSC v. Letter Carriers, 413 U.S. 548 (1973) 4

Day v. Holahan, 34 F.3d 1356 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995) 9

FEC v. National Conservative Political Action Committee, 470 U.S. 480 (1985) 5

FEC v. National Right to Work Committee, 459 U.S. 197 (1982) 5

Kentucky Right to Life, Inc. v. Terry, 108 F.3d 637 (6th Cir.), *cert denied*, 118 S.Ct. 162 (1997) 3, 10

Florida Bar Assoc. v. Went For It, Inc., 515 U.S. 618 (1995) 11

Munro v. Socialist Workers Party, 479 U.S. 189 (1986) 11

Reynolds v. Sims, 377 U.S. 533 (1964) 13

TABLE OF AUTHORITIES – Continued

Page

Russell v. Burris, 146 F.3d 563 (8th Cir.), *cert. denied*, 67 U.S.L.W. 3332 (U.S. Nov. 16, 1998) 12

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 11

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 12

White v. Register, 412 U.S. 755 (1973) 13

LEGAL TREATISES

Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary*, 11 Yale L. & Pol'y Rev. 273 (1993) 7

Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key To Restoring the Health of Our Democracy*, 94 Colum. L. Rev. 1126 (1994) 7

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Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds*, NEW YORK TIMES, Apr. 9, 1997, at A1 7

E.J. Dionne, *Democracy or Plutocracy?*, THE WASHINGTON POST, op-ed, Feb. 15, 1994, at A17 5

Tom Fiedler, *Big Interests Spending Equally Big Bucks: Millions of Dollars Given to Campaigns of Influential Policy Makers*, THE MIAMI HERALD, May 21, 1995, at 14A 5

TABLE OF AUTHORITIES – Continued

Page

Philip B. Heyman & Donald J. Simon, *Parties to Corruption*, THE WASHINGTON POST, op-ed, June 25, 1998, at A23 5

Albert R. Hunt, *The Best Congress Money Can Buy*, THE WALL STREET JOURNAL, Sept. 7, 1995, at A15 6

Celinda Lake & Steve Cobble, *Voters Say Take 'Big Money' Out of Campaigns*, MILWAUKEE JOURNAL SENTINEL, op-ed, Apr. 16, 1995, at 4A 6

Charles Lewis and The Center for Public Integrity, *The Buying of Congress: How Special Interests Have Stolen Your Right to Life, Liberty, and the Pursuit of Happiness* (1998) 6

Larry Makinson, Center for Responsive Politics, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992) 7

Rodney A. Smith, *White House Auction*, THE WASHINGTON POST, op-ed, Apr. 14, 1995, at A19 6

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The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (available at http://www.publicampaign.org/poll9___3___98.html) 7

TABLE OF AUTHORITIES – Continued

Page

Time to Rethink Buckley v. Valeo, NEW YORK TIMES, editorial, Nov. 12, 1998, at A22 6

Unlimited Cash, Undue Influence, ST. LOUIS POST-DISPATCH, editorial, July 27, 1998, at B6 6

Howard Wilkinson, *No Campaign Money? Keep Your' Mouth Shut About It*, THE CINCINNATI ENQUIRER, editorial, Nov. 22, 1998, at C1 6

INTEREST OF AMICI

Amici include the following Secretaries of State: Dan Gwadesky of Maine, Mike Cooney of Montana, James Langevin of Rhode Island, Riley Darnell of Tennessee, Ken Hechler of West Virginia, and Doug LaFollette of Wisconsin.[1] *Amici* also include Steven G. Churchwell, General Counsel to the California Fair Political Practices Commission, Robert Watada, Executive Director of the Hawaii Campaign Finance Spending Commission, and George Russell, Director of the Kentucky Registry of Election Finance. In these positions, *amici* serve as chief election officers or supervisors of campaign finance in their States. They thus have considerable experience with the issues raised in this case, and in particular have witnessed the serious threats that unlimited campaign contributions pose to the integrity of the electoral process.

Amici seek review of the Eighth Circuit's decision in this case because that court's interpretation of *Buckley v. Valeo*, 424 U.S. 1 (1976), threatens to undermine reasonable campaign contribution limits at the state, local and federal level that are necessary to preserve the health of our democracy. Relying on this Court's conclusion that legislatures may eliminate "the opportunity for abuse inherent in the process of raising large monetary contributions" (*Buckley*, 424 U.S. at 30), thirty-five states and a

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[1] The parties have consented to the filing of this brief. Their letters are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity other than *amici* made a financial contribution to the preparation or submission of this brief.

large number of localities have enacted campaign contribution limits similar to those at issue here, based on their studied belief that such regulations are necessary to prevent actual and apparent corruption in state and local government. These reasonable contribution limits help stem widespread public cynicism about elected officials' ability to govern in the public interest and check the capacity of wealthy interests to exert improper influence over legislative and executive policies. Left undisturbed, the Eighth Circuit's decision will erect a new, insuperable barrier for states to justify the adoption of such limits, undermining existing laws throughout the country and chilling the future efforts of other jurisdictions to enact similar, necessary regulations.

STATEMENT

In determining the proper balance between the need for funds adequate to run viable campaigns and the potential for buying influence, the Joint Interim Committee on Campaign Finance Reform of the Missouri General Assembly entertained testimony reflecting "a broad spectrum of opinions" before arriving, by consensus, at a schedule of carefully graduated contribution limits that would be adjusted over time according to inflation. (Appendix ("App.") 14a-15a).[2] Notably, the highest of

[2] In this brief, citations to "App." refer to the Appendix attached to the Petition for Writ of Certiorari filed by petitioners Jeremiah W. (Jay) Nixon, Richard Adams, Patricia Flood, Robert Gardner, Donald Gann, Michael Greenwell, Elaine Spielbusch, and Robert McCulloch. *See Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari (filed December 14, 1998).

these contribution limits, which apply to statewide offices and to local offices where the population exceeds 250,000, match the limits applicable to candidates for federal office upheld in *Buckley* which are still in force today. In crafting appropriate contribution limits, the Missouri General Assembly conducted hearings and internal discussion regarding the actual condition of the state electoral system. App. 15a, 31a. After detailed deliberation, Missouri adopted limits that would address the danger of *quid pro quo* corruption and, equally importantly, combat the appearance of such corruption.

The District Court, noting that "[t]here is more than ample reason to defer to the considered judgment of the Missouri legislature", found the limits entirely consistent with this Court's decision in *Buckley*. App. 41a. A divided panel of the Eighth Circuit, however, reversed, announcing three distinct interpretations of what a state must demonstrate to justify the imposition of contribution limits and casting a pall of doubt over the future viability of such limits throughout the country. In so doing, the Eighth Circuit created a stark split with the Sixth Circuit, which recently upheld a $1,000 contribution limit for similar campaigns. *See Kentucky Right to Life, Inc. v. Terry*, 108 F.3d 637, 648 (6th Cir.), *cert. denied*, 118 S. Ct. 162 (1997). By rejecting out of hand the Missouri legislature's informed judgment regarding the actual conditions of Missouri politics, the panel majority ignored a central tenet of this Court's decision in *Buckley* and usurped a role specifically reserved by that case to the legislative branch of government.

REASONS FOR GRANTING THE PETITION

I. THE EIGHTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS WHICH RECOGNIZE THAT LARGE CAMPAIGN CONTRIBUTIONS CAUSE REAL AND IRREPARABLE HARM TO OUR POLITICAL PROCESSES.

The panel majority below has effectively nullified an integral premise of this Court's campaign finance decisions by interpolating a new and impossible burden of proof for states to carry in order to justify contribution limits. *See* App. 19a (Gibson, J., dissenting). While the *Buckley* Court recognized that the contribution limits are necessary to serve the government's compelling interest in "deal[ing] with the reality or appearance of corruption *inherent* in a system" of large contributions (424 U.S. at 28) (emphasis added), the Court of Appeals insisted that the government does not have such a compelling interest absent proof of actual corruption. *Compare Colorado Republican Federal Campaign Comm. v. FEC*, 518 U.S. 604, 609 (1996) (plurality opinion) (contribution limits serve the government's compelling interest in "assuring the electoral system's legitimacy, protecting it from the appearance and reality of corruption"); *CSC v. Letter Carriers*, 413 U.S. 548, 565 (1973) (avoiding appearance of improper influence is "critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent").

The Eighth Circuit's decision flies in the face of this Court's common sense recognition that "the scope of [actual corruption] can never be reliably ascertained". 424

U.S. at 27. By requiring "demonstrable evidence" of "genuine problems" (App. 5a), the panel majority destroyed a major pillar of this Court's analysis of campaign finance, under which "marginal restrictions upon the contributor's ability to engage in free communication" have been approved in light of the grave, self-evident threat to our electoral systems' legitimacy posed by unlimited campaign contributions. *See Buckley*, 424 U.S. at 20-21. *See also FEC v. National Conservative Political Action Committee*, 470 U.S. 480, 500 (1985) (approving "proper deference to a congressional determination of the need for a prophylactic rule where the evil of potential corruption had long been recognized"); *FEC v. National Right to Work Committee*, 459 U.S. 197, 210 (1982) ("Nor will [the courts] second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared"); *Blount v. SEC*, 61 F.3d 938, 945 (D.C. Cir. 1995) ("no smoking gun is needed where, as here, the conflict of interest is apparent, the likelihood of stealth is great, and the legislative purpose prophylactic").

Two decades after this Court first acknowledged the pervasive dangers "inherent in a regime of large financial contributions", the harms caused by unrestricted campaign contributions remain well beyond cavil. Anxiety about the corrosive influence of money in politics dominates public discourse throughout the country.[3] Historical

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[3] *See, e.g.*, E.J. Dionne, *Democracy or Plutocracy?*, The Washington Post, op-ed, February 15, 1994, p.A17; Tom Fiedler, *Big Interests Spending Equally Big Bucks: Millions of Dollars Given to Campaigns of Influential Policy Makers*, The Miami Herald, May 21, 1995, p.14A; Philip B. Heyman & Donald J. Simon, *Parties to Corruption*, The Washington Post, op-ed, June 25, 1998, p.A23;

examples of influence peddling and special interest legislation are legion. *See generally,* Charles Lewis and The Center for Public Integrity, *The Buying of Congress: How Special Interests Have Stolen Your Right to Life, Liberty, and the Pursuit of Happiness* (1998).

Public opinion polls at the national level confirm that citizens on all sides of the political spectrum perceive both actual and potential corruption in government. Notably, in a 1996 poll taken directly after the November elections, Americans ranked the "power of special interest groups in politics" second only to "international terrorists" when asked to identify "major threats" to the future of the country.[4] A 1997 poll determined that three-quarters of Americans believe that "public officials make or change policy decisions as a result of money they

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Albert R. Hunt, *The Best Congress Money Can Buy,* The Wall Street Journal, September 7, 1995, p.A15; Celinda Lake & Steve Cobble, *Voters Say Take 'Big Money' Out of Campaigns,* Milwaukee Journal Sentinel, op-ed, April 16, 1995, p.4A; Rodney A. Smith, *White House Auction,* The Washington Post, op-ed, April 14, 1995, p.A19; Howard Wilkinson, *No Campaign Money? Keep Your Mouth Shut About It,* The Cincinnati Enquirer, editorial, November 22, 1998, p.C1; *Political Scandal,* Boston Globe, editorial, October 31, 1996, p.A26; *Time to Rethink Buckley v. Valeo,* New York Times, editorial, November 12, 1998, p.A22; *Unlimited Cash, Undue Influence,* St. Louis Post-Dispatch, editorial, July 27, 1998, p.B6.

[4] Princeton Survey Research Associates/Pew Research Center, *Public Opinion Survey* (November 1996) (available at http://www.people-press.org/unionrpt.htm). In this same survey, forty-nine percent of those polled believed the country was "losing ground" in its efforts to fight political corruption.

receive from major contributors."[5] Further, although polls formerly showed that voters trusted their own congressional representatives while decrying corruption in general, even that has changed. An August 1998 poll of voters in eight states showed that between 65% and 75% of voters now believe that campaign contributions affect the votes of *their own* senators on issues of concern to special interests.[6] Over the past two decades, experience has confirmed one of the basic premises of this Court's campaign finance cases: large campaign contributions pose a grave threat to the actual integrity of our government and erode citizens' faith in the honesty of our elected representatives.[7]

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[5] *See* Francis X. Clines, *Most Doubt a Resolve to Change Campaign Finance Reform, Poll Finds,* New York Times, Apr. 9, 1997, at A1.

[6] The Mellman Group, Inc./Public Campaign, *Public Opinion Poll* (August 1998) (available at http://www.publicampaign.org/poll9___3___98.html).

[7] Even under the existing regimes of contribution limits, monied interests can still exert overwhelming influence over the electoral process through practices such as bundling – the coordinated donation of campaign contributions from individuals representing the same corporation, industry or special interest – and other stratagems. *See, e.g.,* Fred Wertheimer and Susan Weiss Manes, *Campaign Finance Reform: A Key to Restoring the Health of Our Democracy,* 94 Colum. L. Rev. 1126, 1140-1142 (1994); Jamin Raskin and John Bonifaz, *Equal Protection and the Wealth Primary,* 11 Yale L. & Pol'y Rev. 273, 326-327 (1993) (citing Larry Makinson, Center for Responsive Politics, *Open Secrets: The Encyclopedia of Congressional Money & Politics* (2d ed. 1992)). While contribution limits alone may not be sufficient to assure the integrity of our political processes, they nonetheless remain a necessary element of any regulatory scheme. *Cf. Buckley,* 424 U.S. at 28; *Colorado Republican,* 518 U.S. at 609.

In 1994, the people of Missouri found the threat to the integrity of the state's election process so severe that they overwhelmingly adopted contribution limits far below those passed by the state's General Assembly. Despite this, and despite the debates, hearings, and deliberations conducted by the Missouri legislature, the panel majority below deemed the state's showing of the public perception of corruption insufficient to prove large campaign contributions to be a "real problem". The Eighth Circuit's subversion of controlling precedent and common sense, which threatens to erode further the integrity of our electoral processes, warrants review by this Court.

II. THE EIGHTH CIRCUIT'S COMPLETE LACK OF DEFERENCE TO THE MISSOURI LEGISLATURE IS INCONSISTENT WITH THIS COURT'S CAMPAIGN FINANCE PRECEDENTS AND CASES INVOLVING FEDERAL CONSTITUTIONAL SUPERVISION OF STATE ELECTORAL SYSTEMS.

The panel's application of its new evidentiary standard to the instant case reveals that the burden is impossibly subjective and practically insuperable. The fact that a panel of distinguished jurists can so radically disagree about the adequacy of the state's showing demonstrates that the Eighth Circuit's new standard of review invites members of the judiciary to replace the studied judgment of the people's elected representatives with their own predilections. How many expressions of public dismay will suffice to establish a "real problem" (App. 6a) arising from the public's "imagined coercive influence of large financial contributions", which the *Buckley* Court deemed as threatening to our government's legitimacy as *quid pro*

quo corruption? 424 U.S. at 25-27. How specific and concentrated must the public perception of corruption be to justify a limit of $1,000 instead of $1,200, or $1,201? Where the *Buckley* Court decided the former question as a matter of law, and deemed the latter a task for legislators, the Eighth Circuit has instead unilaterally 'overruled' this Court's common sense judgment and unjustifiably broadened the scope of its judicial review.

As the Petitioners have forcefully argued, the Court of Appeals' decision below will invite a wave of strategic litigation challenging contribution limits throughout the country. *See Nixon v. Shrink Missouri Government PAC*, Petition for Writ of Certiorari, at 16-17 (filed December 14, 1998). Since the proper scope and standard of review is now up in the air, numerous jurisdictions may be required to prove not only that they suffer "a real problem with corruption or a perception thereof as a direct result of large campaign contributions" App. 6a, but also that the specific dollar limits they adopted are narrowly tailored to actually combat corruption and the appearance of corruption while allowing "meaningful participation in protected political speech and association". App. 8a (citing *Day v. Holahan*, 34 F.3d 1356, 1366 (8th Cir. 1994), *cert. denied*, 513 U.S. 1127 (1995)). If the Eighth Circuit's categorical rejection of the Missouri legislature's studied decision regarding the appropriate level of contribution limits becomes the model for future cases, few if any state limits will withstand such judicial scrutiny.

Under the panel majority's decision, the state legislature is no longer competent to analyze the actual state of affairs in Missouri, despite the fact that its members have actual experience in campaign fundraising and have

studied this issue in depth. Remarkably, the panel majority dismissed the testimony of the person most familiar with the practices and deliberations of the Missouri legislature as "self-serving, given the senator's vested interest in having the courts sustain the law that emerged from his committee". App 7a.[8] This utter lack of deference on matters clearly within legislative competence is inconsistent with this Court's directives in *Buckley* and in other First Amendment cases. As the District Court below recognized, "a court has no scalpel to probe whether, say, a $2,000 ceiling might not serve as well as $1,000." App. 36a (quoting *Buckley*, 424 U.S. at 30). *See also Kentucky Right to Life*, 108 F.3d at 648. If, as a majority of the panel agreed, Missouri's contribution limits are not different "in kind" from those approved in *Buckley* (424 U.S. at 30), the court had no proper basis to substitute its own judgment as to their appropriate level.

Ignoring *Buckley* and two decades of intervening experience, the panel majority rejected as "conclusory" the Missouri legislatures' predictive judgment that, without limits, state government would fall prey to "real

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[8] Under this standard, no court adjudicating the constitutionality of contribution limits should ever entertain a legislator's "description of evidence before the [relevant] Committee, the conclusions drawn by the Committee, [or] . . . fellow legislators' first-hand knowledge of what it costs to wage a campaign and the dangers presented by contributions above the limits enacted". *See* App. 15a, n.6 (Gibson, J., dissenting). Without such testimony, states will have no authoritative way to satisfy the narrow tailoring prong of the Eighth Circuit's test, and judicial scrutiny of even the most reasonable contribution limits will prove fatal every time.

potential to buy votes" as well as the "appearance of buying votes". App. 7a. However, "[s]ound policy making often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665 (1994). *See also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively"). Similarly, the Eighth Circuit's insistence that Missouri prove the existence of a "real problem" with corruption specifically within its borders[9] does not comport with this Court's First Amendment precedent:

> "Indeed, in other First Amendment contexts, we have permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether . . . or even, in a case applying strict scrutiny, to justify regulations based solely on history, consensus, and 'simple common sense,' *Burson v. Freeman*, 504 U.S. 191 (1992)."

Florida Bar Assoc. v. Went For It, Inc., 515 U.S. 618, 628 (1995). Contrary to these principles, the panel majority announced a new and stringent standard of proof, rejecting the conclusions the Missouri General Assembly (as described by a Campaign Finance Reform Committee

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[9] Contrasting the *Buckley* Court's allusion to "perfidy that had been uncovered in federal campaign financing in 1972", the panel majority refused to infer "that *in Missouri at this time* there is corruption or a perception of corruption". App. 6a (emphasis added).

chair with over thirty years' experience) because they a) did not necessarily reflect the "public perception"; b) were not "objectively 'reasonable' "; and c) were not " 'derived from the magnitude of . . . contributions' that historically have been made to candidates . . . in Missouri". App. 7a (citing *Russell v. Burris*, 146 F.3d 563 (8th Cir.), *cert. denied*, 67 U.S.L.W. 3332 (U.S. Nov. 16, 1998)). Since Missouri, like many states, does not collect and preserve legislative history, one wonders how it could have possibly carried the burden announced by the panel majority.[10] Having determined that Missouri's contribution limits were not different in kind, the Court of Appeals should have recognized the legislature's unique competence to assess the scope of present and future harms posed by large contributions and to adopt limits at appropriate levels.

In First Amendment cases, this Court has recognized the need for some level of deference to the factual determinations of legislators, particularly when future harms must be avoided, complex economic predictions must be made, and disparate interests must be balanced. *See, e.g., Turner Broadcasting Systems, Inc. v. FCC*, 520 U.S. 180 (1997) (courts' "sole obligation" is to assure that legislature has drawn "reasonable inferences based on substantial evidence"); *see also CBS, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973).

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[10] "Judicial deference . . . is based not on the state of the legislative record . . . but 'on due regard for the decision of the body constitutionally appointed to decide' ". *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624, 646 (1997) (citing *Oregon v. Mitchell*, 400 U.S. 112, 207 (Harlan, J., concurring in part)).

The panel majority's lack of deference is also inconsistent with this Court's precedents in cases concerning the proper scope of federal review for state electoral regulations. These cases are instructive insofar as they announce the basic standard of deference that must be accorded legislatures managing the details of state electoral systems. In the context of state legislative redistricting, the Supreme Court has declined to require states to ensure absolute mathematical equality, but instead has deferred to state legislatures so long as they legislate in good faith within the broad dictates of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 577 (1964); *White v. Register*, 412 U.S. 755, 764 (1973) (9.9% population deviation not a prima facie Equal Protection violation); *Brown v. Thomson*, 462 U.S. 846, 843 (1983) (substantial deference is to be accorded the political decisions of the people of a state acting through their elected representatives, particularly when there is no taint of arbitrariness or discrimination). The Court's deference in this area is notable given the fact that the injury in question, vote dilution, is arguably much more severe and electorally significant than the "marginal restrictions upon the contributor's ability to engage in free communication" occasioned by reasonable contribution limits. 424 U.S. 20-21.

The range of permissible deviation in redistricting cases affords a parallel to the 'difference in kind' doctrine announced in *Buckley*. In both instances, the federal courts have announced the standards of federal law and have allowed state legislatures some flexibility in adopting specific remedial legislation that conforms to local circumstances. Unless the Missouri General Assembly

adopted contribution limits different in kind from those approved in *Buckley*, the Court below had no cause to probe those limits for a violation of constitutional principles.

Sixteen states have adopted contribution limits for statewide offices at or below the level approved in *Buckley*. An additional nineteen states have set limits on roughly the same order of magnitude. App. 42a-44a. The Eighth Circuit decision subjects all of these laws, which are integral to the fair operation of our electoral system, to the likelihood of constitutional challenge. While the federal judiciary must outline the standards of federal law, the determination of the predicate facts that trigger the operation of those standards should be left in significant measure to the sound judgment of state legislatures, which are versed in local experience and charged with the duty of operating honest government. The panel's decision has rendered this duty infinitely more difficult. *Amici* respectfully urge this Court to review the Eighth Circuit's decision.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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